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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**

7 DONALD THOMAS,

8 *Petitioner,*

9 vs.

10 ISDRIO BACA, *et al.*,

11 *Respondents.*
12
13

3:14-cv-00114-RCJ-WGC

ORDER

14 This habeas matter under 28 U.S.C. § 2254 comes before the Court for initial review
15 under Rule 4 of the Rules Governing Section 2254 Cases. The filing fee has been paid.
16 Following review, it appears that the petition is subject to dismissal with prejudice as time-
17 barred for failure to file the petition within the one-year limitation period in 28 U.S.C. §
18 2244(d)(1). Petitioner therefore will be directed to show cause why the petition should not be
19 dismissed as time-barred.

20 ***Background***

21 The papers on file and the online docket records of the state courts reflect the
22 following.

23 Petitioner Donald Thomas was convicted, pursuant to a jury verdict, of conspiracy to
24 commit robbery, robbery with the use of a deadly weapon, conspiracy to commit grand
25 larceny auto, and grand larceny auto.

26 On direct appeal, the Supreme Court of Nevada affirmed in a February 4, 2009, order
27 of affirmance, in No. 51873 in that court. The ninety-day time period for seeking *certiorari*
28 review in the United States Supreme Court expired on May 5, 2009.

1 After 141 days had passed, on September 24, 2009, petitioner filed a state post-
2 conviction petition. Proceedings on the petition ultimately concluded on December 12, 2012,
3 with the issuance of the remittitur after the state supreme court affirmed the denial of relief
4 in No. 59780 in that court.

5 On or about February 24, 2014, petitioner mailed the federal petition to the Clerk of this
6 Court for filing.

7 ***Discussion***

8 Pursuant to *Herbst v. Cook*, 260 F.3d 1039 (9th Cir. 2001), the Court *sua sponte* raises
9 the question of whether the petition is time-barred for failure to file the petition within the one-
10 year limitation period in 28 U.S.C. § 2244(d)(1).

11 Under 28 U.S.C. § 2244(d)(1)(A), the federal one-year limitation period, unless
12 otherwise tolled or subject to delayed accrual, begins running after "the date on which the
13 judgment became final by the conclusion of direct review or the expiration of the time for
14 seeking such direct review."

15 In the present case, the limitation period therefore began running after the time expired
16 for seeking *certiorari* review, *i.e.*, after May 5, 2009.

17 Under 28 U.S.C. § 2244(d)(2), the federal limitation period is statutorily tolled during
18 the pendency of a properly filed application for state post-conviction relief or for other state
19 collateral review. Petitioner's state petition therefore tolled the running of the federal limitation
20 period from September 24, 2009, through December 12, 2012.

21 A total of 141 days elapsed before the September 24, 2009, filing of the state petition,
22 leaving 224 days remaining in the one-year limitation period after the December 12, 2012,
23 remittitur. Accordingly, absent other tolling or delayed accrual, the federal limitation period
24 expired on July 24, 2013.

25 The February 24, 2014, federal petition was constructively filed seven months after the
26 federal limitation period had expired, absent other tolling or delayed accrual.

27 Petitioner therefore must show cause in writing why the petition should not be
28 dismissed with prejudice as time-barred.

1 In this regard, petitioner is informed that the one-year limitation period may be equitably
 2 tolled. Equitable tolling is appropriate only if the petitioner can show: (1) that he has been
 3 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way
 4 and prevented timely filing. *Holland v. Florida*, 130 S.Ct. 2549, 1085 (2010). Equitable tolling
 5 is "unavailable in most cases," *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir.1999), and "the
 6 threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the
 7 rule," *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir.2002)(quoting *United States v.*
 8 *Marcello*, 212 F.3d 1005, 1010 (7th Cir.2000)). The petitioner ultimately has the burden of
 9 proof on this "extraordinary exclusion." 292 F.3d at 1065. He accordingly must demonstrate
 10 a causal relationship between the extraordinary circumstance and the lateness of his filing.
 11 *E.g.*, *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). *Accord Bryant v. Arizona Attorney*
 12 *General*, 499 F.3d 1056, 1061 (9th Cir. 2007).

13 Petitioner also is informed that, under certain circumstances, the one-year limitation
 14 period may begin running on a later date or may be statutorily tolled. See 28 U.S.C. §
 15 2244(d)(1)(B), (C) & (D) & (d)(2).

16 Moreover, if petitioner seeks to avoid application of the time-bar based upon a claim
 17 of actual innocence, he must come forward with new reliable evidence tending to establish
 18 his innocence, *i.e.*, tending to establish that no juror acting reasonably would have found him
 19 guilty beyond a reasonable doubt. See *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013); *House*
 20 *v. Bell*, 547 U.S. 518 (2006); *Lee v. Lampert*, 653 F.3d 929 (9th Cir. 2011)(*en banc*).

21 IT THEREFORE IS ORDERED that the Clerk of Court shall file the petition and
 22 accompanying motion for appointment of counsel.¹

23 IT FURTHER IS ORDERED that, within **thirty (30) days** of entry of this order,
 24 petitioner shall SHOW CAUSE in writing why the petition should not be dismissed with
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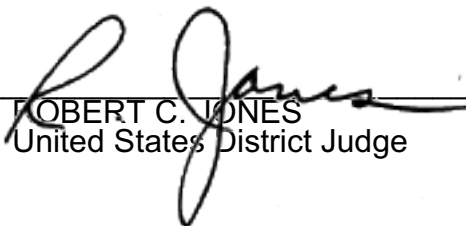
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 27 ¹The Court does not find that the interests of justice require the appointment of counsel prior to a
 28 response to the show-cause order. The motion will remain under submission pending further review. The
 Court further does not suggest that the pleadings are free of deficiencies. The Court defers consideration of
 any deficiencies in the pleadings until after considering in the first instance whether the action is untimely.

1 prejudice as time-barred. If petitioner does not timely respond to this order, the petition will
2 be dismissed with prejudice as time-barred without further advance notice. If petitioner
3 responds but fails to show – with specific, detailed and competent evidence – that the petition
4 is timely, the action will be dismissed with prejudice.

5 IT FURTHER IS ORDERED that all assertions of fact made by petitioner in response
6 to this show-cause order must be detailed, must be specific as to time and place, and must
7 be supported by competent evidence. The Court will not consider any assertions of fact that
8 are not specific as to time and place, that are not made pursuant to a declaration under
9 penalty of perjury based upon personal knowledge, and/or that are not supported by
10 competent evidence filed by petitioner in the federal record. Petitioner must attach copies of
11 all materials upon which he bases his argument that the petition should not be dismissed as
12 untimely. Unsupported assertions of fact will be disregarded.

13 DATED: June 3, 2014.

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ROBERT C. JONES
United States District Judge